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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 944

RUDY SALOMONS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Superior Court of the State of California, in and for the County of Los Angeles (Appellate Department).

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No. .....

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Petition for a Writ of Certiorari to the Superior Court of the State of California, in and for the County of Los Angeles (Appellate Department).

The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review a judgment of the Superior Court of the State of California, in and for the County of Los Angeles, (Appellate Department), affirming the Order of the Municipal Court of the Los Angeles Judicial District denying petitioner's motion to set aside his plea of guilty.

Two opinions were delivered by the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles. Neither are recorded. Both opinions are included in the record certified to this Court. In each case the order of the Municipal Court of the Los Angeles Judicial District was affirmed, but after rehearing, upon a different basis.

Jurisdiction.

The order of the Superior Court of California was entered on January 29, 1960. On April 18, 1960, Mr. Justice Douglas ordered an extension for the time for filing this petition to May 14, 1960.

The jurisdiction of this Court was invoked under the provisions of 28 U. S. C. Sec. 1257(3).

The Appellate Department of the Superior Court of the State of California is a Court of Last Resort. *In re Wiegand* (D. C. 1939), 27 Fed. Supp. 725.

Questions Presented for Review.

A. Whether the failure to allow the withdrawal of the plea of guilty induced by promises of leniency is consistent with the Fourteenth Amendment to the United States Constitution prohibiting the denial of due process of law.

B. Whether the failure to grant an evidentiary hearing on the question of inducement to enter a plea of guilty is consistent with the Fourteenth Amendment to the United States Constitution prohibiting denial of due process of law.

C. Whether the arbitrary power to disregard uncontradicted allegations of denial of due process is not, *per se* denial of due process prohibited by the Fourteenth Amendment to the United States Constitution.

Pertinent Constitutional and Statutory Provisions.

(1) United States Constitution, Fourteenth Amendment:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law;"

(2) California Business and Professions Code Sec. 2141:

> "Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this State, or who diagnosis, treats, operates, for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this Chapter, is guilty of a misdemeanor."

Statement of the Case.

Petitioner is a chiropractor duly licensed to practice his profession in the State of California.

On April 22, 1959, a complaint filed, sworn to by Byard Woodruff (Senior Investigator for the Board of Medical Examiners of the State of California) charged the defendant with, among other things, five counts of violation of Sec. 2141 of the Business and Professions Code.

Thereafter, upon the express representation of the said Byard S. Woodruff and Robert O. Merritt (also an investigator for the Board of Medical Examiners) that if petitioner pled guilty to one count of the complaint, he would receive nothing more than a fine and probation, petitioner entered a plea of guilty to Count 4 of the said complaint (alleging the violation of Sec. 2141 of the Business and Professions Code.)

At the date and time set for the hearing for petitioner's application for probation, the Municipal Court of the Los Angeles Judicial District did in fact grant the de-

fendant probation and did in fact fine him ($500.00), but did also impose, among other conditions of probation, that the defendant serve the first thirty (30) days of the probationary period in the City Jail.

Thereafter, the petitioner noticed a motion in the said Municipal Court to "set aside the judgment and plea of guilty;" attaching thereto affidavits of the petitioner and one Victor L. Hite, setting forth the facts and circumstances of the representations of the officials of the State of California, coercing defendant into entering the plea of guilty. One of the bases for the motion was that to compel a plea of guilty by threats, fraud or coercion was a denial of due process under the Fourteenth Amendment of the United States Constitution.

The motion was heard by the sentencing Court upon argument of counsel. No additional evidence was introduced upon the part of the Respondent, People of the State of California, nor were any opposing affidavits filed by the Respondent People of the State of California, or by the said Byard S. Woodruff or Robert O. Merritt.

The motion, dated July 6, 1959 was noticed for July 13, 1959 and conformed to Section 1201.5 of the Penal Code of the State of California, requiring at least three days' notice of such a motion and service upon the prosecution.

The motion of petitioner was denied by the said sentencing Court. Thereafter, petitioner noticed an appeal to the Appellate Department of the Superior Court in and for he County of Los Angeles, appealing in part from the order denying petitioner's motion.

Petitioner's opening brief on his appeal to the Superior Court alleged in part that the compelling of a plea

of guilty by threat, fraud or coercion is a denial of due process under the Fourteenth Amendment of the United States Constitution.

The first memorandum opinion of the Appellate Department of the Superior Court stated in part as follows:

> "As to the appeal from the order denying defendant's motion to change his plea to not guilty, he was represented by counsel when he changed his plea from not guilty to guilty. The Court was entitled to believe he relied on the advice of counsel, when he pleaded guilty instead of on the advice which a layman had given him some twenty-seven days before he had changed his plea."
>
> *"The other points are likewise without merit . . ."*
>
> (Emphasis added.)

In a petition for rehearing, the petitioner pointed out to the Appellate Court, that (1) the representations were made to appellant by an officer of the State and not a layman, and (2) that the representations upon which petitioner had relied were made not twenty-seven days prior to, but on the date of the entry of the plea. Thereupon, a rehearing was granted to petitioner.

The second memorandum opinion of the Appellate Court, after discussing whether or not the petitioner had in fact a proper appeal from the order denying his motion stated as follows in part:

> 1. ". . . we affirm the order in question on the authority of such cases as *Smith vs. Smith* (1958), 157 Cal. App. 2d 658 which states at page 662: 'It is clear from the Court's discussion, previously referred to, that the Court did not give full credence to the affidavits of plaintiff, her daughter and at-

torney. This the Court was privileged to do although the affidavits were not contradicted by opposing affidavits in view of the interests of affiant in the outcome of the case.' See also *People v. Bannister*, (1957), 153 Cal. App. 2d 480, 484.

"The order denying defendant's motion to set aside judgment and plea of guilty and to modify probation is affirmed. The appeal from the judgment is dismissed."

Petitioner is presently at liberty on bail. Execution of the jail sentence imposed has been stayed pending the outcome of this petition for a Writ of Prohibition.

Reason for Granting This Writ.

The Federal Questions Herein Have Been Properly Raised and Passed Upon at All Stages of the Proceedings. No Adequate Non-Federal Ground Was Used as a Basis for Respondent's Court Decision.

The Constitutional issue was presented in time. The first time that it could have been raised was after the trial court passed sentence. However, the facts relied upon in the motion to set aside the plea of guilty were outside the record and could not have been reviewed on appeal. Therefore, it was proper to make the argument for the first time in the motion. See *Waley v. Johnston* (1942), 316 U. S. 101.

Petitioner herein claimed denial of due process of law under the Fourteenth Amendment of the Constitution, immediately after being sentenced in the trial court, in his notice of motion to set aside the judgment and plea of guilty, in the points and authorities attached thereto and additionally in petitioner's opening brief on appeal to the Appellate Court.

The motion of petitioner to set aside his plea of guilty contained in the points and authorities attached thereto the following:

> "The Fourteenth Amendment of the United States Constitution enjoins a state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States; and from depriving any person from life, liberty or property without due process of law. The same injunction appears in Article I, Section 13 of the California Constitution."
>
> "To compel a plea of guilty by threats, fraud or coercion is denial of due process, and, in a proper case, if found to exist, would warrant issuance of Writ of error *coram nobis*. *People vs. Chapman*, 106 Cal. App. 2d 51."

The identical language was used in petitioner's opening brief on appeal. Though inartfully presented, perhaps, petitioner intended to and did invoke the due process clause of the Fourteenth Amendment to the United States Constitution.

The obvious purport of the pleadings taken as a whole was that petitioner's plea of guilty was involuntary in that it was psychologically coerced by responsible State officers and thereby an unlawful inducement. Petitioner maintains that although the pleadings may not have been as explicit as possible, their meaning falls squarely with the holding of the case of *Braniff Airways v. Nebraska State Board* (1953), 347 U. S. 590, 598-599, wherein this Court held that even though the appellant cited the wrong clause of the Constitution (Commerce Clause, rather than the Due Process Clause) that "though inex-

plicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented."

See also:

New York ex rel. Bryant v. Zimmerman (1928), 278 U. S. 63, 67:

"No particular form of words or phrases is essential, but only that the claim of invalidity in the ground therefore be brought to the attention of the state Court with fair precision and in due time. And, if the record as a whole shows rather expressly, or by clear intendment that this was done, the claim is to be regarded as having been adequately presented. Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put into direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

Of course where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon a Federal question, to analyze the fact, this Court will review the State Court's findings.

Sterling v. Constantine (1932), 287 U. S. 378, 398;

Chambers v. Florida (1939), 309 U. S. 227, 228-229;

Norris v. Alabama (1934), 294 U. S. 587, 590;

Ashcraft v. Tennessee (1943), 322 U. S. 143, 147-148;

Graig v. Harney (1946), 331 U. S. 367, 373-374.

The Respondent Appellate Court Passed Squarely Upon the Federal Questions Raised by Petitioner and Decided Adversely to the Petitioner and to the Fourteenth Amendment of the United States Constitution and Denied Petitioner Due Process of Law.

First of all, there was no adequate and independent ground for the decision other than upon the Federal question raised by petitioner. This statement requires a consideration of the second memorandum opinion of the Appellate Department of the Superior Court of California.

The Court there declared that the purported appeal from the judgment was dismissed because there was no judgment. At no point in petitioner's briefs was there any indication that he was appealing from the judgment. This indication was presented in petitioner's notice of appeal at the very end.

The Court then went on to say that the order denying the petitioner's motion to set aside the plea of guilty was probably an appealable order. If the Court had said it was not appealable without qualifying it, it would constitute an adequate independent non-Federal ground. However, the Court continues in its opinion to declare that even if the order is appealable, it should be affirmed and in the next to last sentence of the opinion, it declares that the order is affirmed. Therefore, the Court effectively held that the order was appealable, for if it were not, then the proper ruling would have been "appeal dismissed" rather than "order affirmed." Thus, the Court decided the case on the merits of the contention that the guilty plea should be disallowed, since it denied due process of law to the petitioner.

In the recent case of *Irvin v. Doud* (1959), 359 U. S. 394, the State Supreme Court explicitly declared that there was no basis for an appeal but continued its opinion and declared that the defendant had not been denied his constitutional rights. This Court, in denying certiorari originally, indicated that Federal habeas corpus would lie; and after the lower Courts had denied defendants' petition, the defendant once again brought a certiorari to this Court, which allowed his petition.

Although the *Doud* case is not directly in point, since it involves certiorari for the purposes of determining whether or not habeas corpus was proper, yet the case is of great significance in that implicit within this Court's granting of the petition therein, is that there was no adequate and independent stated ground for dismissal of the appeal therein notwithstanding the fact that the State Court seemed to hold that a state procedural rule precluded appeal. Apparently by discussing the Federal issues involved in the appeal at the State level, the State Court had nullified any claims of adequacy of independent non-Federal grounds. The *Doud* case, *supra*, implies that the Appellate Department of the Superior Court herein in fact decided the petitioner's case on the merits by discussing the Federal question and by affirming the order, rather than by dismissing the appeal from the order. Thus, the Appellate Court cannot be said to have passed upon any question on an adequate non-Federal ground, since the Court waived them by discussing the case on the merits, *i.e.*, on the withdrawal of the plea of guilty induced by the promises of leniency.

A subsidiary question which the Court itself discussed in its first memorandum opinion, but did not reiterate in its second memorandum opinion, was the question of

whether or not the plea of guilty was induced by a responsible state officer. The first opinion indicated that the promises were made by a "layman." The second opinion remained silent on the subject, and therefore we can assume withdrew its objections to this specific point.

In petitioner's affidavit to the trial Court, he alleges that the promises were made on three separate occasions by State Officers:

1. On May 5th, Mr. Robert O. Merritt, a special investigator of the State Board of Medical Examiners.

2. Between May 4th and June 1st, Mr. Caplan, (his attorney) told petitioner that the State Board (Medical) itself had made promises.

3. On June 1st, promises were made by Mr. Woodruff, Senior and Special Investigator for the State Board of Medical Examiners. Mr. Woodruff also signed the complaint.

Section 2116 of the Business and Professions Code, State of California states:

> "The Board (Medical) may prosecute all persons guilty of violating the provisions of this Chapter (2141 Business and Professions Code is included therein). It may employ inspectors, special agents and investigators . . . to carry into effect the provisions of this Chapter."

In *Reid v. Maloney*, 38 Cal. App. 2d 405 (1940), the Court stated:

> "The members of the State Board of Medical Examiners are public officers. The special officer Burn was a public police officer. The Court analogized the Medical Board and its officers to the Chief of Police and his subordinates."

And, in *People v. Jabon,* 153 Cal. App. 2d 456 (1957), it was stated that

> "Robert Truitt, a special investigator for the Board of Medical Examiners, arrested defendant and . . . Truitt had a warrant for the arrest of defendant issued by the Municipal Court for a violation of Section 2141 of the Business and Professions Code, practicing medicine without a license . . . Truitt was considered a peace officer."

Petitioner herein was arrested by Officials of the Board on a signed complaint by a Board investigator.

Fundamental Rights of Petitioner, Guaranteed Him by the Constitution of the United States Have Been Violated and the Petitioner Has Been Denied Due Process of Law Under the Fourteenth Amendment Thereto.

A. Petitioner was denied the right to withdraw his involuntary, coerced plea of "guilty."

The rule is well established that a *confession* which is induced by promises of leniency is "involuntary" and therefore to utilize it to obtain a conviction is a denial of due process.

Bramm v. U. S. (1897), 168 U. S. 532, 557;
Watts v. Indiana (1948), 338 U. S. 49, 59-60.

A plea of guilty is equivalent to a full confession in open Court.

Pennsylvania ex rel. Harman v. Claudy (1956), 350 U. S. 116;
Littlejohn v. Hiatt (1952), 197 F. 2d 334;
Accadia v. U. S. (1927), 15 F. 2d 619.

Q. E. D. A plea of guilty which has been induced by promises of leniency cannot be allowed to stand since a conviction based thereon violates due process of law.

Waley v. Johnston, supra, 316 U. S. 101.

See also:

Leyra v. Benno (1953), 347 U. S. 556.

B. Petitioner was denied due process in that he was not given a hearing for the purpose of presenting evidence on the question of the inducement offered to him in exchange for the plea of guilty.

Where a defendant petitions for a habeas corpus in the ground that his conviction was based on an "involuntary" guilty plea or confession, a trial Court cannot dismiss the petition without hearing evidence, unless it appears from the face of the petition that the petition is wholly without merit.

Pennsylvania ex rel. Harman v. Claudy, supra, 350 U. S. 115;

Waley v. Johnston, supra, 316 U. S. 101.

Where the defendant moves to have a sentence vacated on the grounds of involuntary guilty plea or confession, the same rule applies.

Motley v. U. S. (1956 5th Cir.), 230 F. 2d 110.

The above rules are equally applicable to the petitioner herein in his motion to withdraw his plea of guilty. Due process of law demands that the petitioner should have been given a hearing.

As stated in *Waley v. Johnston, supra,* 316 U. S. 101, at page 104:

"If the allegations are found to be true, petitioner's constitutional rights were infringed. Where a con-

viction on a plea of guilty coerced by a Federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession . . ."

Pennsylvania ex rel. Harman v. Claudy, supra, 350 U. S. 116 (1956) at page 120:

"The allegations as to petitioner's treatment prior to confession and his understanding of the nature and consequence of a guilty plea present the very kind of dispute which could be decided only after a hearing."

The Court went on further to state that the petitioner there could not be denied a hearing, *even though the allegations in his petition for a writ of habeas corpus were controverted.*

This Court will review a finding of fact of a state Court where a Federal right has been denied as a result of the findings shown by the record to be without evidence to support them.

Fiske v. Kansas (1927), 274 U. S. 380, 385-386.

In the instant case, there is no evidence before either the trial Court or the appellate court which tended to indicate that the guilty plea was not induced by leniency promises. The only evidence before the trial Judge and the Appellate Court was the uncontradicted affidavit of petitioner and his impartial corroborating witness, which conclusively established a plea of guilty was the result of promises of leniency made by responsible state officers.

C. Petitioner contends that to allow the state Court the arbitrary power to disregard uncontradicted allegations of denial of due process is, *per se,* a denial of due

process of law prohibited by the Fourteenth Amendment to the United States Constitution.

By extrapolation of the meaning and sense of the cases cited in (A) and (B) above, it is evident that the Respondent Appellate Court permitted the trial Court to use its unfettered discretion to disbelieve uncontradicted affidavits of petitioner and his corroborating witness. If a state Court is given the power to disbelieve such uncontradicted affidavits, it is in effect given uncontrolled discretion to disallow the withdrawal of a guilty plea, even if the Court believes the plea resulted from and it was in fact caused by promises of leniency or otherwise.

If the Appellate Court can accept the rule that the trial Court can disbelieve the uncontradicted affidavits without having a hearing on the issues raised therein, it would not have before it any facts upon which to review the trial Court's discretion.

If the Appellate Court is allowed to disregard the affidavits as was obviously the case at bar, and then merely declares the rule without delving further into the question of the denial of due process, then the trial Court is left with complete discretion to arbitrarily and capriciously refuse to allow the withdrawal of any plea of guilty, no matter what the circumstances behind the plea.

Even if the Appellate Court did choose to delve into the question of inducement or involuntariness, it would have no way of determining the basis upon which the trial Court denied the motion.

The traditional reasons given by Appellate Courts in refusing to review a trial Court's finding of fact does not exist in the present case. Usually, it is said that the trial Court is able to judge the demeanor of the witnesses, the way in which they relate their testimony and other

facts which enable the trier of the fact to determine their credibility.

In the instant case, the trial Judge (and the Appellate Court) only had the uncontradicted affidavits before them and therefore, they could in no way determine the credibility of petitioner or the other affiant. Therefore, the traditional reason for refusing to re-examine the findings of the trial Court on the Appellate level do not exist here.

This Honorable Court is in as good a position as was the trial Court to determine whether the plea of guilty was induced by and was the result of the promise of leniency by responsible state officers. And it has been held on numerous occasions that this Court will review a state Court's findings of fact where a Federal right has been denied as a result of the findings shown by the record to be without evidence to support it.

Fiske v. Kansas, supra, 274 U. S. 380, 385-386;

Creswell v. Knights of Pythias, 225 U. S. 246, 261;

Stanley v. Schwalby, 162 U. S. 225, 274-277-279;

Schlemmer v. Buffalo, Rochester & Pittsburgh Railway Company, 205 U. S. 1;

Kansas City So. Railway Co. v. Alberts Comm. Co., 223 U. S. 573, 591.

A rule which has built into it the uncontrolled power to violate fundamental Federal rights to a trial on the merits must be violation of the defendant's right to due process of law.

The Due Process Objections Raised in This Petition Have Not Heretofore Been Precisely Presented, Examined nor Passed Upon by This Court.

There has never been a United States Supreme Court decision that has squarely decided that a plea of guilty induced by promises of leniency violates due process. Some cases contain dictum and others seem to be based upon other than constitutional grounds:

Bramm v. U. S. supra, 168 U. S. 532, 557:

"In this Court, the general rule that the confession must be free and voluntary, that is not produced by underlying inducements engendering either *hope* or fear is settled . . ." (Emphasis added);

Watts v. Indiana, supra, 338 U. S. 49, 59-60:

"Of course, no confession which has been obtained by any form of physical violence to the person is reliable and hence, no conviction should rest upon one obtained in that manner. Such treatment not only breaks the will to conceal or rely, but may even break the will to stand by the truth. Nor, is it questioned that the same result can sometimes be achieved by threats; *promises* or *inducements* which torture the mind, but put no scars on the body." (Emphasis added.)

(Both of the above cited cases were coerced confession cases.)

The cases of *Motley v. U. S.* (5th Cir. 1956), 230 F. 2d 110; (guilty plea); *Shelton v. U. S.* (5th Cir. 1957) 246 F. 2d 571 (*guilty plea*); and *Crawford v. U. S.* (5th Cir. 1955), 219 F. 2d 207 (confession) have held that a conviction based on promises of leni-

ency are non-supportable, but the former two do not indicate they are based on constitutional grounds and the latter is decided on the basis of a Federal statute.

So far as petitioner can ascertain, the precise point of whether a denial of motion to withdraw a plea of guilty induced by a promise of leniency is a denial of due process of law under the Fourteenth Amendment to the United States Constitution, has not yet been settled.

As far as this petitioner can determine, there is no case dealing with the question of whether or not as a matter of due process of law the State should have granted petitioner a hearing upon the question of the alleged inducement; and whether the failure to give such a hearing, whether requested or not, was a denial of due process of law under the Fourteenth Amendment of the United States Constitution.

The petitioner's third basis for this petition for a Writ of Certiorari; that it is and was a denial of due process of law for the Respondent Appellate Court to allow the trial Court to disbelieve the uncontradicted affidavits alleging a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States, has never been raised nor passed upon in dictum or otherwise, to the knowledge of your petitioner.

The only case that petitioner can find concerning "deals" made with law enforcement officers is that of *Crawford v. U. S.*, 219 F. 2d 207 (Fifth Cir., 1955) wherein the Court held that confessions were involuntary and hence inadmissible. At page 211, the Court declares:

> "From appellant's standpoint, it was a poor bargain, since the officers had no authority to promise him immunity. But the controlling fact is that there

was a bargain. Part and parcel of the whole conversation about source of supply and 'cooperation' which will not afford an immunity relieves appellant from the use of admission into evidence against him. 'In the Federal Courts requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat, A confession is voluntary in law, if, and only if, it was, in fact, voluntarily made."

Conclusion.

In the light of the foregoing, the petitioner urges that he has been improperly sentenced to confinement by respondents and improperly denied his right to a trial on the merits due to the involuntary nature of the plea of guilty entered by petitioner in the trial Court. Petitioner respectfully prays that this Court grant his petition for a writ of certiorari to the Appellate Department of the Superior Court of the State of California, in order that a full hearing as to this matter may be had.

Respectfully submitted,

HARRY M. UMANN,
Attorney for Petitioner.

UMANN, OLAN & MARKS,
Of Counsel.

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Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI.

(Volume II)

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APPENDIX I.

Transcript of Clerk's Docket in Trial Court.

Pages 12-15 of Certified Record.

April 22, 1959.

Complaint filed sworn to by Byard S. Woodruff charging the Defendant with having on May 26, 1958, at Los Angeles City, in the County of Los Angeles, State of California, committed a misdemeanor, to-wit: VIOLATION SECTION 26286.5 HEALTH & SAFETY CODE COUNT I, VIOLATION SECTION 2141 BUSINESS & PROFESSIONS CODE COUNT II, VIOLATION SECTION 2141 BUSINESS & PROFESSIONS CODE COUNT III, VIOLATION SECTION 2141 BUSINESS & PROFESSIONS CODE, COUNT IV, VIOLATION SECTION 26286.5 HEALTH & SAFETY CODE COUNT V, VIOLATION SECTION 2141 BUSINESS & PROFESSIONS CODE COUNT VI, VIOLATION SECTION 2141 BUSINESS & PROFESSIONS CODE COUNT VII.

April 22, 1959.

Warrant issued. Bail set at $1000.00.

May 4, 1959.

$1000.00 surety bond approved and filed. (U. S. Fidelity and Guaranty Company).

May 5, 1959.

Cause called. Judge Delbert Wong presiding. Both parties ready. People represented by J. L. Denny, (D.C.A.) Defendant represented by Paul Freeman.

Defendant in court, duly arraigned, informed of the charges against him and of his legal rights. Defendant gives true name as charged and enteres his plea of not guilty of the offense charged.

Defendant with counsel in open court each personally demands jury trial.

Trial set for June 4, 1959, at 9 A. M. in Division 20.

Bail up to stand.

May 14, 1959.

Affidavit for subpoena duces tecum, filed. Subpoena duces tecum issued.

June 1, 1959.

In the following case Erwin Goodman Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge David W. Williams presiding. Both parties ready. People represented by Jack D. Scott, (D.C.A.) Defendant represented by R. Benson.

Defendant in court, and leave of court first obtained withdraws plea of not guilty heretofore entered and now enters plea of guilty of the offense charged as to Count IV. Counts I, II and III dismissed. Waives time.

Defendant makes oral application for probation, continued to June 22, 1959, at 1:30 P. M. for hearing on probation and sentence in Division 20.

Bail up to stand.

June 22, 1959.

In the following case A. Figueroa Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge David W. Williams presiding. Both parties ready. People represented by Jack D. Scott, (D.C.A.) Defendant in court and represented by Ralph Benson.

Probation report filed. Probation granted.

Proceedings suspended without imposition of sentence and defendant placed in custody of Probation Officer for a period of two years subject to the following terms of probation;

1. Serve first 30 days in City Jail.
2. Pay a fine of $500.00.
3. Possess no medicine or similar equipment which bears the word "caution" nor dispense without a prescription.
4. Place no advertisements in newspapers which may be construed as misleading.
5. Maintain residence as approved by Probation Officer.
6. Maintain employment as approved by Probation Officer.
7. No further violations of law.

Stay on commitment until July 6, 1959, at 1:30 P. M. in Division 20.

Fine $500.00 paid Rec. 18536.

Bail ordered exonerated.

June 30, 1959.

In the following case M. Racklin Reporter is ordered to take down proceedings as provided by law.

Cause called. Judge David W. Williams presiding. Both parties ready. People represented by Jack D. Scott, (D.C.A.) Defendant in court and represented by B. Marks.

Cause continued to July 13, 1959, at 1:30 P. M. on motion of Defendant.

July 13, 1959.

In the following case Lester Zive, Reporter is ordered to take down proceedings as provided by law. Division 20 convened at 1:30 P. M.

Cause called. Judge David W. Williams presiding. Both parties ready. People represented by Jack D. Scott, (D.C.A.) Defendant in court and represented by Burton Marks; J. B. Nisbet, Deputy Clerk.

Defendant's motion to vacate plea of guilty and enter plea of not guilty—denied.

Notice of Appeal from order denying motion, filed.

Proposed Statement on Appeal, filed.

Bail set on appeal in the sum of $1000.00.

$1000.00 cash bail posted. Rec 37005-U.

Execution of sentence stayed.

Appeal bail up to stand.

July 14, 1959.

Affidavit of service of the Notice of Appeal and Proposed Statement on Appeal, filed.

July 23, 1959.

Division 20. Judge David W. Williams presiding. People represented by Jack D. Scott, (D.C.A.) Defendant not in Court and not represented.

Entry of June 1, 1959 ordered corrected nunc pro tunc, to read as follows:

Defendant in court, and leave of court first obtained withdraws plea of not guilty heretofore entered and now enters plea of guilty of the offense charged in Count 4.

Counts 1, 2, 3, 5, 6 and 7 dismissed.

July 24, 1959.

Hearing to settle Statement on Appeal is set for July 31, 1959 at 2:00 P. M. in Division 20.

Notices mailed. Affidavits of service by mail sworn and filed.

July 31, 1959.

In this case Lester Zive, Reporter is ordered to take down proceedings as provided by law. Division 20 convened at 1:30 P. M.

Cause called. Judge David W. Williams presiding. Both parties ready. People represented by Jack D. Scott, (D.C.A.) Defendant not in court but represented by Burton Marks; J. B. Nisbet, Deputy Clerk.

Statement on Appeal settled, allowed, certified and signed.

APPENDIX II.

Affidavits in Support of This Petitioner's Motion in the Trial Court to Set Aside the Judgment and Plea of Guilty.

Pages 18-24 inclusive of Certified Record.

AFFIDAVIT OF RUDY SALOMONS IN SUPPORT OF MOTION TO SET ASIDE JUDGMENT AND PLEA OF GUILTY AND/OR MOTION FOR MODIFICATION.

State of California, County of Los Angeles—ss.

RUDY SALOMONS deposes and says:

That he is over the age of eighteen years and if called and sworn could competently testify to the facts as hereinafter set forth.

That your affiant is a licensed doctor of chiropracty and has been so licensed by the State of California Department of Professional and Vocational Standards since November 12, 1948; that he is the defendant in the within case.

That on or about the 4th day of May, 1959, your affiant was arrested at his office by State Officers assigned to the Board of Medical Examiners and was thereafter arraigned on several counts of alleged violation of the Business and Professional Code (a photostatic, certified copy of the Complaint filed against your affiant is attached hereto and marked Exhibit "A" and made a part of this Affidavit by reference); that thereafter your affiant pleaded "not guilty" to each and every count therein.

That on May 5, 1959, after your affiant had been arraigned on the said charge, your affiant in the presence of VICTOR L. HITE, (D.C.) was visited at his office by ROBERT O. MERRITT, a special investigator for the Board

of Medical Examiners, a department of the State of California.

That at said time and place MR. MERRITT and your affiant and DR. HITE had a conversation with respect to the offenses which your affiant had allegedly committed. At that time MR. MERRITT informed your affiant in the presence of DR. HITE that in this type of case the ordinary situation was to plead "guilty" to one count of the Complaint and pay the fine and there would be nothing more done about the case. To your affiant's best recollection, MR. MERRITT's exact words were, "Why fight it? You won't be in any jeopardy. We don't bother you after this comes to Court. You just pay your fine and forget it."

That thereafter, between May 4 and June 1, 1959, your affiant retained an attorney, MR. RALPH BENSON, for his defense. That MR. HOWARD KAPLAN, attorney at law, an associate of MR. BENSON, informed your affiant that he had gone and talked to the Board of the Medical Examiners and was told by the said Board that if a guilty plea to one of the counts was entered no jail sentence would be given to your affiant.

That thereafter, on June 1, 1959, (the date set for trial of your affiant), your affiant's attorney, MR. KAPLAN, went into the Judge's chambers with the City Attorney. MR. KAPLAN then emerged from the Judge's chambers and informe your affiant that if he would plead guilty to count IV of the Complaint that the Court would dismiss all other counts. MR. KAPLAN informed your affiant that the Judge would require a Probation Report before he would sentence your affiant.

At the time of this conversation with MR. KAPLAN your affiant was seated next to MR. BYARD S. WOODRUFF, Senior Special Investigator for the Board of Medi-

cal Examiners. MR. WOODRUFF heard the discussion between your affiant and his attorney and after hearing that a Probation Report was required he informed your affiant as follows: "Don't worry, Rudy, I assure you there is not going to be a jail sentence. You go up there and plead "guilty" to count IV and you'll get straight probation and a stiff fine. Why I even know of a case where the Probation Officer did not recommend probation, and the Judge granted it nevertheless."

That furthermore, although your affiant had never seen the actual Complaint in this matter, at the time of his entering his plea of guilty he had been informed by his counsel and by the aforesaid members of the State Board of Medical Examiners that the offense involved in count IV involved the matter of dispensing vitamin tablets in the month of January 1959, without being a licensed Doctor of Osteopathy or M. D.; that at the time your affiant entered his plea of guilty to the said count IV, your affiant was fully aware of the opinion from the State Board of Chiropractic Examiners, dated January 13, 1957, wherein said opinion stated that the dispensing of vitamins, enzymes, minerals, dietary supplements and foods were a proper part of chiropractic practices. That notwithstanding your affiant's knowledge and feeling that he had complied only with the opinion of the Board of Chiropractic Examiners, he nevertheless was induced and persuaded to plead guilty to said count IV of the Complaint upon the representations of the representatives of the State Board of Medical Examiners that there would be nothing more serious than a fine and probation. That your affiant is a very busy practitioner and rather than spend the time and expense involved in a protracted trial, your affiant felt it would be better to get the whole thing over with as promised to him. That if your affiant

had known or had any reason to know that he would have been sentenced to jail for an offense which was not a crime, he would have demanded a jury trial and have his guilt or innocence determined in accordance with his Constitutional rights. (A copy of the transcripts of the proceedings had at the time of your affiant's entering his plea of "guilty" to count IV of the Complaint is appended hereto and marked Exhibit "B" and made a part of this Affidavit by reference.)

That after entering a plea of guilty to the said offense your affiant had occasion to speak with the Probation Officer and at the time of talking with the Probation Officer was assured by the Probation Officer that probation would be granted to your affiant in accordance with the representations made to your affiant by the representatives of the State Board of Medical Examiners and their investigating officers. (A copy of the Probation Report is appended hereto and marked Exhibit "C" and made a part of this affidavit by reference.)

That since your affiant has been sentenced your affiant has had occasion to read a copy of the Probation Officer's Report wherein the Probation Officer describes the alleged events of January 1959, wherein your affiant is allegedly supposed to have practiced medicine without a license. That the events therein described (as related by the arresting officer) describe nothing more than the use of physical therapy and/or physiotherapy—including galvanic and sinusoidal currents, and shortwave diathermy, all of which is approved as part of the normal practice of a chiropractor according to the aforementioned opinion of January 13, 1957, from the Board of Chiropractic Examiners. The opinion of January 13, 1957, is appended to the Probation Report.

That thereafter, on June 22, 1959, your affiant appeared before the HONORABLE DAVID WILLIAMS in Division 20 of the above entitled Court. (A transcript of the proceedings had therein is appended hereto and marked Exhibit "D" and made a part of this affidavit by reference.)

That at said time and place the Court pronounced sentence against your affiant, a portion of which sentence was that your affiant be placed on two years' probation; pay a fine in the sum of $500.00, and serve the first thirty days in jail. One further condition of probation was that your affiant not publish or cause to be published any advertising which "might be construed as misleading."

That under the rules and regulations of the State Board of Chiropractic Examiners it is permissible for chiropractors to advertise their trade in a dignified and professional manner. That your affiant does not know what kind of advertising "might be construed as misleading"; does not know who might so construe it; and therefore does not have any way of knowing any advertising he might do would be a violation of his terms of probation. Your affiant respectfully submits that this condition of probation is a prior restraint on his right to free speech as guaranteed by the United States and California Constitutions.

That your affiant notes in the Probation Report that he is accused of having a prior violation of a similar nature charged against him. That your affiant respectfully states that the "prior violation" was a violation involving the failure of your affiant to use the initials "D.C." after his name. That the only place at the time of the alleged prior violation where the initials "D.C." did not appear

were on the appointment cards of your affiant. That because your affiant was technically guilty of the said offense through an oversight, your affiant pleaded guilty as charged.

That your affiant once again reiterates that if it were not for the assurances, representations and promises of officers of this State that your affiant would not receive a jail sentence your affiant would not have pleaded guilty to the offense as charged or any of the offenses as charged since your affiant does not believe himself to be guilty as aforesaid. That your affiant well and truly believes that the sentence as imposed by this Court is harsh, cruel and unusual in light of the facts brought before this Court; that your affiant is a man of good moral character and has never been charged with any other offenses than as stated herein and his good moral character has been attested to by the letters of reference appended to the Probation Report. That your affiant well and truly believes that the representations made by the State Board of Medical Examiners were false, fraudulent and well calculated to overreach the free will of your affiant and each and every representation as made by said State Officers was made knowing the statements to be false.

WHEREFORE, your affiant respectfully requests this Honorable Court grant your affiant's Motion to set aside his plea of guilty and to vacate the judgment and/or in the alternative to modify your affiant's sentence to eliminate the jail time imposed.

I certify under penalty of perjury the aforegoing statements to be true and correct.

Dated: July 6, 1959.

RUDY SALOMONS
Rudy Salomons

AFFIDAVIT OF VICTOR L. HITE IN SUPPORT OF MOTION TO SET ASIDE JUDGMENT AND PLEA OF GUILTY AND/OR MOTION FOR MODIFICATION.

State of California, County of Los Angeles—ss.

VICTOR L. HITE deposes and says:

That he is over the age of eighteen and if called and sworn could competently testify to the facts as hereinafter set forth.

That your affiant has read that portion of the Affidavit of Rudy Salomons wherein he states that a conversation between RUDY SALOMONS and an investigator, MR. MERRITT, held at the office of DR. SALOMONS and your affiant, at 3156 Wilshire Boulevard, on or about May 5, 1959, took place.

That your affiant was present at all times during the conversation between MR. MERRITT and DR. SALOMONS and affirms that MR. MERRITT did in fact tell DR. SALOMONS that if he (DR. SALOMONS) were to plead guilty of one count all of the rest of the counts would be dismissed and that there would be no further trouble and that all that DR. SALOMONS would get out of it would be a fine and possibly probation; that if he (DR. SALOMONS) would plead guilty to the one count as suggested that he, MERRITT, could assure him that nothing more would happen.

That thereafter and prior to June 1, 1959, your affiant had occasion to talk to DR. SALOMONS in private wherein DR. SALOMONS informed your affiant that if he, DR. SALOMONS, could be assured of a fine and probation and get the matter over with he would plead guilty to a count as MR. MERRITT had suggested; that if he could not get such assurance he might as well fight the matter

since it was perfectly evident that he was not guilty of any crime.

I certify under penalty of perjury the aforegoing statements to be true and correct.

Dated: July 6, 1959.

VICTOR L. HITE
Victor L. Hite

APPENDIX III.

Memorandum Opinion of the Appellate Department of the Superior Court, County of Los Angeles State of California.

Pages 65-67 inclusive of Certified Record.

This opinion is unreported.

Appeal by defendant from order and "judgment" of the Municipal Court of the Los Angeles Judicial District, David W. Williams, Judge. Order affirmed; appeal from judgment dismissed. For Appellant—Umann and Marks. For Respondent—Roger Arnebergh, City Attorney; Philip E. Grey, Assistant City Attorney; William E. Doran, Deputy City Attorney.

The purported appeal from the judgment must be dismissed because sentence was not pronounced and, therefore, there is no judgment. We have grave doubts as to whether the order denying defendant's motion to set aside judgment and plea of guilty is appealable. It is well established that such an order is not appealable but is reviewable on appeal from the judgment. People v. Moffett (1955), 137 Cal. App. 2d 626. The only theory upon which this order could be appealable is that an order granting probation is, in some ways, comparable to a judgment and this order was made after probation was granted. Such an order would be appealable if made after judgment. Penal Code 1237 which governs appeals from the Superior Court states: "an order granting probation shall be deemed to be a final judgment within the meaning of this section." Penal Code 1466 re appeals to the Superior Court makes orders granting probation appealable but does not state that such an order is deemed a final judgment. We need not spend any more time on

this point. If the order is not appealable, the appeal therefrom should be dismissed, if it is appealable that order should be affirmed. The end result is the same in either case. We affirm the order in question on the authority of such cases as Smith v. Smith (1958), 157 Cal. App. 2d 658, which states at p. 662: "It is clear from the court's discussion, previously referred to, that the court did not give full credence to the affidavits of plaintiff, her daughter and her attorney. This the court was privileged to do although the affidavits were not contradicted by opposing affidavits in view of the interest of the affiants in the outcome of the case." See also People v. Bannister (1957), 153 Cal. App. 2d 480, 484.

The order denying defendant's motion to set aside judgment and plea of guilty and to modify probation is affirmed. The appeal from the judgment is dismissed.

Dated January 29, 1960.

SWAIN
Presiding Judge

We concur:

HULS
Judge

SMITH
Judge

APPENDIX IV.

Judgment.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the order denying defendant's moiton to set aside judgment and plea of guilty and to modify probation made and entered in the Municipal Cort of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed. The appeal from the judgment is dismissed.

APPENDIX V.

Pertinent Excerpts From This Petitioner's Motion in the Trial Court and His Opening Brief in the Appellate Court.

Pages 28-29; 74-75 of the Certified Record.

The excerpt from each pleading is identical with the other.

"The Fourteenth Amendment of the United States Constitution enjoins a state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States; and from depriving any person of life, liberty or property without due process of law. The same injunction appears in Article One, Section Thirteen, of the California Constitution.

To compel a plea of guilty by threat, fraud or coercion is denial of due process, and, in a proper case, if found to exist, would warrant issuance of Writ of Error coram nobis.

People v. Chapman, 106 Cal. App. 2d 51."

FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 16 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 944

RUDY SALOMONS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI.

ROGER ARNEBERGH,
City Attorney of the City of Los Angeles,
PHILIP E. GREY,
Assistant City Attorney,
WILLIAM E. DORAN,
Deputy City Attorney,
ARTHUR KARMA,
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Attorneys for The People of the State of California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA 6-9171.

TABLE OF AUTHORITIES CITED

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IN THE

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RUDY SALOMONS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI.

Petitioner is seeking to secure a hearing in this Court upon the basis that the failure to allow the withdrawal of his plea of guilty, as outlined in his petition, violated the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Petitioner's theory is defective, in that it neglects the established rule that an accused who seeks to set aside a plea of guilty must show good cause therefor, and that the granting or denial of such application rests in the sound discretion of the trial court. Further, the decision will not be disturbed on appeal unless an abuse of that discretion is clearly shown.

United States v. Shailer, 202 F. 2d 590, cert. denied, 337 U. S. 947, 98 L. Ed. 1094;

People v. Ottenstror, 127 Cal. App. 2d 104, 374 P. 2d 289.

In the instant case no affidavit was filed by petitioner's former counsel to corroborate the hearsay statements attributed to him in petitioner's affidavit. Significantly, petitioner's affidavit omitted any allegation that his counsel, in reliance on the purported statements of the medical officer, advised petitioner to plead guilty. Likewise, never was there any claim that the City Attorney or the court had ever approached, or been approached by petitioner in the matter of the expectant sentence if a plea of guilty were entered.

The trial court properly had before it the Probation Officer's Report [Ex. "C" of Petitioner's Notice to Set Aside Judgment and a Plea of Guilty] when petitioner was sentenced. This Report controverted certain factual issues of petitioner's affidavit, allowing the court to justly conclude that the affidavits of these interested parties lacked credibility and it thereby refused to exercise the discretion necessary to permit a plea of guilty to be withdrawn.

Where a defendant in a criminal case alleges a deprivation of a constitutional right, the decision of the local court must be judged on the basis of the scope of the remedy provided and what the court properly had before it in such proceedings.

Carter v. Illinois, 329 U. S. 173, 91 L. Ed. 172.

In the instant case, while the findings of the state courts are not conclusive upon this court they are entitled to great weight and respect (*Michel v. Louisiana*, 350 U. S. 91, 100 L. Ed. 83) and should not be overruled where, in the exercise of its discretion, the state court ruled against petitioner on fairly debatable factual issues. (*Hoag v. New Jersey*, 356 U. S. 464, 2 L. Ed. 2d 913.)

There was no abuse of discretion to shock the conscience or be intolerable in our system of law, but instead petitioner's acts bring him within *People v. Caruso*, 174 A. C. A. 677, ... P. 2d ....., which held that a defendant charged with an offense cannot be permitted to gamble on the anticipated result of a voluntary plea of guilty and, when disappointed at the outcome, re-establish a right to trial.

Conclusion.

The petition for writ of certiorari does not disclose a clear and convincing showing that there has been a violation of petitioner's rights under the Federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with applicable decisions of this Court, or decided a federal question of substance not theretofore determined by this Court.

Respondent prays that the petition be denied.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney of the City of Los Angeles,

PHILIP E. GREY,
Assistant City Attorney,

WILLIAM E. DORAN,
Deputy City Attorney,

ARTHUR KARMA,
Deputy City Attorney,

Attorneys for The People of the State of California.